SUPREME COURT, U. S.

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No. 1126

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

CLARA L. WASHINGTON,

Petitioner,

v.

GOLDEN STATE MUTUAL LIFE INSURANCE COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF TEXAS

PETITION

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FIDELITY PRINTING COMPANY, INC., HOUSTON

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PETITION

To The Honorable Mr. Chief Justice
and to The Honorable Mr. Justices
of The Supreme Court of the United States:

REFERENCE TO OPINIONS BELOW

The opinion of the Court of Civil Appeals, First Supreme Judicial District is reported in 405 S.W. 2d 856. The opinion of the Supreme Court of Texas is reported in 408 S.W. 2d 227.

A copy of both of such opinions are appended to this petition, being printed in Appendix A.

JURISDICTION

The date of the Judgment of The Supreme Court of Texas sought to be reviewed is November 9, 1966, and the time of its entry was shortly after 9:00 A.M., on said date. (For the Supreme Court of Texas announces these various orders from the bench beginning at 9:00 A.M.).

Petitioner's motion for rehearing of application for writ of error was overruled on December 7, 1966, and the time of its entry was shortly after 9:00 A.M., on said date.

The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari is 28 U.S.C., Section 1257 (3) and 2101 (c).

QUESTIONS PRESENTED

1. Does the due process of law clause, and the equal protection of the laws clause, of the Fourteenth Amendment to the Constitution of the United States protect a citizen of a State from a State judge rendering a motion for summary judgment in favor of the movant on only nine (9) days notice to the opposite party, when the rules of civil procedure of the State require ten (10) days notice of such motion for summary judgment to the opposite party, before a motion for summary judgment may be rendered?

2. Where a substantive right guaranteed to a citizen of a State under the Constitution of the United States is intertwined with one or several rules of civil procedure of a State, can an appellate court or the supreme court of such a state deny the substantive right guaranteed under the Constitution of the United States?

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The constitutional provision involved is Section 1, Article XIV of the Constitution of the United States:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of Life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The statute involved is Rule 166-A (c) of the Rules of Civil Procedure of the State of Texas, and is as follows:

Rule 166-A (c). Summary Judgment

(c) Motion and Proceedings thereon. The motion shall be served at least ten days before the time specified for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that, except as to the amount of damages, there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. (Vernon's Annotated Texas Rules of Civil Procedure, Page 477).

(The Rules of Civil Procedure are not merely procedural or technical, but have dignity of statutory provisions, *Pearl Assur. Co.* v. *Williams,* Civ. App. 1943, 167 S.W. 2d 808).

STATEMENT

Petitioner sued respondent to recover $3,333.00, the face amount on an insurance policy on the life of her husband, (Tr-2) plus 12% damages on the amount of such sum as the statutory penalty, (Tr-3). Prior to trial of the case on the merits, respondent filed a motion for summary judgment which was served on the attorney for the petitioner on January 22, 1966, by certified mail No. 349153. (Tr-36, 41). The motion for summary judgment was heard on January 31, 1966, (Tr-32) and the trial court granted the motion for summary judgment. (Tr-32). Only nine (9) days notice was given to the petitioner of this motion for summary judgment. (Rule 4, Texas Rules of Civil Procedure, Computation of Time). The Texas Rules of Civil Procedure requires ten (10) days notice to the opposite party of a motion for summary judgment. (T.R.C.P. 166-A(c)).

Petitioner filed a motion for new trial on March 5, 1966, (Tr-33, 34, 35, 36) and on March 30, 1966, presented to the Court Proponent's Motion for New Trial, (Tr-37) which motion was set down for hearing on the 11th day of April, 1966. (Tr-38)

That (Mr.) John Held, an attorney for the respondent was served with a subpoena duces tecum to bring with him to the hearing of the motion for new trial, Return Receipt Requested Card, for United States certified mail No. 349153, (Tr-39) which the attorney for the respondent did, and it was marked Def. Ex. (Tr-41)
#1

That on the 11th day of April, 1966, the hearing of the motion for new trial was had by the trial court and said motion for new trial was decided and determined on that date, and overruled. (Tr-42) And the Judge signed the

order overruling the motion for new trial on the 26th day of April, 1966. (Tr-42)

Petitioner filed her appeal bond on the 20th day of May, 1966. (Tr-43)

The Court of Civil Appeals, First Supreme Judicial District, held that the appeal bond was not filed in time as the 30 days allowed for the filing of the appeal bond was to be computed from the expiration of the forty-five day period, namely, April 19, 1966, and not from the date of the signing of the order by the trial judge, April 26, 1966, overruling the motion for new trial, and that the Court of Civil Appeals lacked jurisdiction.

This opinion of the Court of Civil Appeals, First Supreme Judicial District, held differently from an opinion of the Court of Civil Appeals, Sixth Supreme Judicial District, sitting at Texarkana, namely, *Holland* v. *Foley Brothers Dry Goods Company,* 324 S.W. 2d 430 (Tex. Civ. App. writ ref.) decided in 1959, wherein the Court of Civil Appeals, sitting at Texarkana, apparently held by a unanimous court that if the trial court decided or determined the motion for new trial on or before the 45th day after the filing of the motion for new trial that the date for the filing of the appeal bond would begin to run from the date of the signing of the order by the trial court, and not at the expiration of the forty-five day period.

The stage in the proceedings in the court of first instance at which, and the manner in which, the federal questions sought to be reviewed were raised, was in the Motion for New Trial, (Tr-34).

EIGHTH

The error of the Court in granting a summary judgment to the defendant wherein defendant has only given the plaintiff and opposite party nine days notice of the motion for summary judgment, for such nine days notice is not sufficient notice under Rule 166-A of the Texas Rules of Civil Procedure, and is therefore in violation of due process of law, and equal protection of the laws under Section 1, Article XIV of the Constitution of the United States.

The trial court overruled the motion for new trial in all things. (Tr-42)

On appeal to the Court of Civil Appeals, the federal questions sought to be reviewed were raised as follows:

In appellant's (this petitioner) Opposition to Motion to Dismiss Appeal, in paragraph VII, stating as follows:

That for the Court of Civil Appeals, First Supreme Judicial District, to place the interpretation urged by the counsel for the appellees in the time allowed for the filing of the appeal bond would be violative of the following:

(a) Rule 329b of the Texas Rules of Civil Procedure;

(b) Rule 356 of the Texas Rules of Civil Procedure;

(c) Rule 306a of the Texas Rules of Civil Procedure;

(d) Rule 1 of the Texas Rules of Civil Procedure;

(e) Section 19, Article I, of the Constitution of the State of Texas;

(f) Section 1, Article XIV, of the Constitution of the United States.

In the brief of appellant, by assignment of error, Eighth Point:

EIGHTH POINT OF ERROR (Restated)

In granting a summary judgment to the defendant wherein defendant has only given the plaintiff and opposite party nine days notice of the motion for summary judgment, for such is in violation of due process of law, and equal protection of the laws under Section 1, Article XIV of the Constitution of the United States.

The Court of Civil Appeals did not pass upon the federal questions sought to be reviewed.

In appellant's motion for rehearing before the Court of Civil Appeals, the federal questions sought to be reviewed were raised by assignment of error, third assignment of error:

THIRD ASSIGNMENT OF ERROR

The Court of Civil Appeals erred in interpreting Rule 329b, Rule 356, and Rule 306a of the Texas Rules of Civil Procedure in the manner that it has for such interpretation is violative of Section 19, Article I, of the Constitution of Texas, and is also violative of Section 1, Article XIV of the Constitution of the United States.

Appellant's motion for rehearing was overruled by the Court of Civil Appeals.

In petitioner's application for writ of error to the Supreme Court of Texas, the federal questions sought to be reviewed were raised by points of error, as follows:

THIRD POINT

The error of the Court of Civil Appeals in sustaining the error of the trial court in granting a summary judgment on only nine (9) days notice in fundamental error and is prejudicial error.

FOURTH POINT

The Court of Civil Appeals erred in not considering the Brief of the Appellant filed in the case, which was based on the error of the Court of Civil Appeals in interpreting Rule 329b, Rule 356, and Rule 306a, T.R.C.P., in the manner that it has, for such interpretation is violative of Section 19, Article I, of the Constitution of the State of Texas, and such interpretation is also violative of Section I, Article XIV of the Constitution of the United States.

The Supreme Court of Texas did not mention the Third Point of Error in its opinion. The Supreme Court of Texas apparently did not consider the brief of the appellant filed in the Court of Civil Appeals, but did approve the opinion and holding of the Court of Civil Appeals with respect to the construction placed upon Rules 329b, 356, and 306a of the T.R.C.P.

In the petitioner's motion for rehearing, the federal questions sought to be reviewed were raised by the following:

Grounds relied upon for the rehearing:

I.

This Honorable Court erred in not granting the Application for Writ of Error, and in not reversing and remanding this cause for a new trial, because the trial court in granting a summary judgment to the defendant and respondent on only nine (9) days notice to the plaintiff and petitioner of such motion for summary judgment violated Rule 166-A, T.R.C.P., and thereby this supposed judgment of the trial court is a void judgment.

III.

This Honorable Court erred in not granting the Application for Writ of Error, and in not reversing and remanding

the case to the trial court for a new trial because of prejudicial error of the trial court in granting a summary judgment to the defendant and respondent on only nine (9) days notice to the plaintiff and petitioner, and the error resulted in prejudice to the plaintiff and petitioner, and the error caused an improper judgment.

REASONS FOR GRANTING THE WRIT

A state court has granted a motion for summary judgment against the petitioner not in accordance with rules of civil procedure of the State of Texas, in that the rules of civil procedure require ten (10) days notice of such motion and petitioner only had nine (9) days notice of such motion.

That the appellate courts of the State of Texas have upheld the granting of a motion for summary judgment on only nine (9) days notice of such motion to the petitioner, when the rules of civil procedure of the State of Texas require ten (10) days notice of such motion.

That a state court has decided a federal question of substance, either not theretofore determined by this Court, or has decided it in a way probably not in accord with applicable decisions of this Court.

That the state courts of Texas have deprived the petitioner, a citizen of the United States and of the State of Texas, of due process of law, and the equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States. And the deprivation of these substantive rights have been accomplished by the intertwining of a rule of civil procedure of the State of Texas, with a substantive right guaranteed by the Constitution of the United States. And Rule 1, of the Texas Rules of Civil Procedure states: "The proper objectives of rules of civil procedure is (are) to obtain a just, fair, equitable and im-

partial adjudication of the rights of litigants under established principles of substantive law. To the end that this objective may be attained with as great expedition and dispatch and at the least expense both to the litigants and to the state as may be practicable, these rules shall be given a liberal construction.

In order for a moving party to be granted a summary judgment, all of the requirements prerequisite to obtaining same must be strictly complied with. *Garcia* v. *Parr,* 316 S.W. 2d 396; *Gardner* v. *Martin, et al.,* 345 S.W. 2d 274. And one of the requirements under the Texas Rules of Civil Procedure is that the opposite party must be given ten (10) days notice; nine (9) days notice is not sufficient.

CONCLUSION

For the foregoing reasons, petitioner prays that the Supreme Court of the United States grant this petition for a Writ of Certiorari, and petitioner further prays for costs of court in all state courts and in the Supreme Court of the United States.

Respectfully submitted,

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Appeal dismissed w.o.j., Chief Justice Bell not sitting, and opinion filed July 7, 1966.

APPENDIX A

No. 14911

CLARA L. WASHINGTON,

Appellant,

v.

GOLDEN STATE MUTUAL LIFE INSURANCE COMPANY,

Appellee.

APPEAL FROM DISTRICT COURT OF HARRIS COUNTY

The question presented is whether the time for the filing of an appeal bond runs from the date of the signing of an order overruling a motion for new trial where the motion was presented within thirty days of its filing and the ruling of the court was announced, but the order was not signed by the court until after the expiration of forty-five days.

In this case the judgment was signed February 24, 1966. A motion for new trial was filed on March 5, 1966. The order overruling the motion for new trial recites that it came on to be heard on April 11, 1966 and that it was signed April 26, 1966. The appeal bond was filed on May 20, 1966.

Rule 329-b, T.R.C.P., provides that all motions for new trial "must be determined within not exceeding forty-five days after the original . . . motion is filed, unless by written agreement of the parties in the case, the decision of the motion is postponed to a later date." No written agreement

of the parties postponing the decision appears in the transcript. The forty-five day period expired April 19, 1966.

Rule 356, T.R.C.P., requires bonds for costs on appeal to be filed within thirty days after the date of judgment or order overruling motion for new trial. Compliance with this rule has been held to be mandatory and jurisdictional to an appeal. The time limits prescribed cannot be dispensed with or enlarged by this Court for any reason. *Glidden Co.* v. *Aetna Casualty & Surety Co.*, 1956, 155 Tex. 591, 291 S.W. 2d 315; *Neuhoff Bros. Packers* v. *Acosta*, Tex. Civ. App. 1959, 319 S.W. 2d 416, aff'd 160 Tex. 124, 327 S.W. 2d 434.

Where no order overruling a motion for new trial is signed by the trial court, the motion is overruled by operation of law after forty-five days and the period within which the appeal bond must be filed begins. *Lucchese* v. *Specia*, Tex. Civ. App. 1955, 281 S.W. 2d 725, error ref.; *Texas Employers Ins. Ass'n* v. *Martin*, 1961, 162 Tex. 376, 347 S.W. 2d 916.

The judgment of the trial court overruling the motion for new trial was rendered on the day it was signed. Rule 306a, T.R.C.P.; Ex Parte Godeke, 1962, 163 Tex. 387, 355 S.W. 2d 701.

Since the order overruling the motion for new trial was rendered after the expiration of forty-five days from the date it was filed, it was a nullity since the motion had been previously overruled by operation of law. *Lucchese* v. *Specia, supra; Martinez* v. *Stephens*, Tex. Civ. App., 1952, 246 S.W. 2d 707.

The period within which the appeal bond had to be filed to confer jurisdiction on this Court, therefore, began on April 19, 1966, the day the motion for new trial was over-

ruled by operation of law. The last day for filing was May 19, 1966. The cost bond was filed on May 20, 1966. This Court acquired no jurisdiction of the case, and the appeal is ordered dismissed, Chief Justice Bell not sitting.

/s/ TOM F. COLEMAN
Associate Justice

Judgment rendered and opinion filed July 7, 1966.

IN THE SUPREME COURT OF TEXAS

No. A-11726

CLARA L. WASHINGTON,

Petitioner,

v.

GOLDEN STATE MUTUAL LIFE INSURANCE COMPANY,

Respondent.

FROM HARRIS COUNTY FIRST DISTRICT

ON APPLICATION FOR WRIT OF ERROR

PER CURIAM

The Court of Civil Appeals has held that the appellant's motion for new trial was overruled by operation of law on April 19, 1966. It dismissed the appeal because the appeal bond was not filed within thirty days after that date. 405 S.W. 2d 856. In the course of its opinion, the intermediate court stated: "The judgment of the trial court overruling the motion for new trial was rendered on the day it was signed." As we interpret this statement, it means that for the purpose of determining the time within which the various steps of the appeal must be taken, the order is deemed to have been rendered on the day it was signed. See Rule 306a, Texas Rules of Civil Procedure. On the basis of that construction, we approve the opinion and the holding of the Court of Civil Appeals, and the application for writ of error is Refused.

Associate Justice Smith not sitting.

Opinion delivered November 9, 1966